United States Court of Appeals

for the Second Circuit

APPELLANT'S PETITION FOR REHEARING EN BANC

76-7005

United States Court of Appeals

FOR THE SECOND CIRCUIT

No. 76-7005

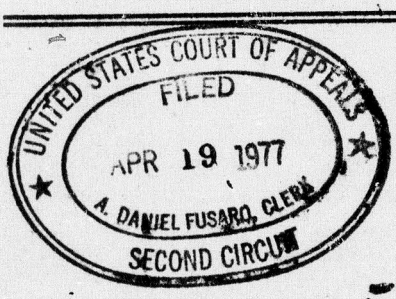
EAST HARTFORD EDUCATION ASSOCIATON, ET AL
Appellants

v.

BOARD OF EDUCATION OF THE
TOWN OF EAST HARTFORD, ET AL
Appellees

On Appeal From the United States District Court
for the District of Connecticut

BRIEF FOR THE APPELLANTS
ON EN BANC RECONSIDERATION



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PRELIMINARY STATEMENT

Appellants have set forth their arguments at length in their brief to the original panel. We refer the court to that brief, together with the soundly reasoned opinion of the majority of the panel.

In light of the exhaustive nature of the majority opinion, we will not repeat the points made therein, but will focus on the arguments contained in the dissenting opinion.

ARGUMENT

I.

THE DISSENT WRONGLY CONCLUDES THAT THE SYMBOLIC EXPRESSION IN WHICH BRIMLEY WISHES TO ENGAGE IS NOT CLOSELY AKIN TO PURE SPEECH.

To the extent that the dissent suggests that the "simple refusal to wear a tie" does not rise to the level of real expression, the suggestion can bear little weight in the context of this case. Indeed, as the dissent itself points out, the Board's concern is that Brimley's not wearing a tie is an expressive act:

> "The majority is inconsistent when it credits Mr. Brimley's notion that tielessness carries a message to his students, but belittles the board's conclusion that wearing a tie is equally expressive." (p. 1880).

With both parties asserting that Brimley's tielessness is expression, it would be singularly inappropriate to grant summary judgment against Brimley on the ground that it is not.

Brimley's tielessness thus must be seen as "symbolic speech" of the same order as the armband worn by the teacher in James v. Board of

Education, 461 F.2d 566 (2d Cir. 1971). In James, this Court recognized the right of teachers to engage in symbolic expression during school hours. In that case a teacher alleged that he was impermissibly terminated for wearing a black armband in class as a symbolic protest against this nation's involvement in the Vietnam War. The court framed the issues as follows:

> "The question we must ask in every first amendment case is whether the regulatory policy is drawn as narrowly as possible to achieve the social interests that justify it, or whether it exceeds permissible bounds by unduly restricting protected speech to an extent 'greater than is essential to the furtherance of' those interests. See United States v. O'Brien, 391 U.S. 367, 377, 88 S.Ct. 1673, 1679, 20 L.Ed. 2d 672 (1968). Thus, when a teacher presents a colorable claim that school authorities have infringed on his first amendment rights and arbitrarily transgressed on these transcendent values, school authorities must demonstrate a reasonable basis for concluding that the teacher's conduct threatens to impair their legitimate interests in regulating the school curriculum. 461 F.2d at 574 (emphasis added).

In concluding that James was wrongfully terminated, this court was persuaded by the following factors:

> (1) By wearing an armband, James was symbolically engaging in a very personal form of free expression;
>
> (2) It was clear to James' students that the armband represented a personal statement and not an attempt to proselytize a particular viewpoint;
>
> (3) The protest did not meaningfully

disrupt normal school functions; and

(4) It is impossible to restrict a teacher's protests to non-school hours, since a teacher might become so identified with a cause as a result of his after-hours efforts that he would be identified with that cause during school hours even in the absence of physical symbols.

The facts presented in the present case are clearly analogous to those assessed in James. The teacher's refusal to wear a tie is motivated by a desire to symbolically demonstrate that he is not tied to "establishment conformity"; that he rejects "many of the customs and values" of the older generation; and that he sympathizes with the values of the students' generation.1/ By expressing these views through the absence of a tie, the appellant has adopted a very personal means of communication that is divorced from all hint of proseletyzation.2/

The dissent concludes that the proposed symbolic expression is "close to the 'conduct' end of the 'speech-conduct' continuum," and thus that the Board need not make as great a showing of interest as if the expression had been pure speech. It places reliance upon its perception that while the message conveyed by the black

1/ It is true that Mr. Brimley also seeks his "tieless facade" as an effective teaching device. But even if the Court should not agree with the opinion of the majority regarding a teacher's right to freely select his teaching methodology, James must be read to prohibit a state from banning practices that embody symbolic speech, unless the state can show that these devices actually impair legitimate educational interests.

2/ The record is devoid of any evidence whatsoever to support the suggestion in the dissenting opinion that Brimley was attempting to "indoctrinate his students with the values implicit in tielessness." (p. 1882).

armband in James was clear, Brimley's symbolic speech claims are "extremely diffuse" (p.1878). Brimley, however, has a precise meaning which he seeks to convey by his tielessness. While it is true that in the absence of explanation some members of the audience might not "get the message," the same is true in any case involving symbolic expression. The efficacy of any symbolic speech depends in part upon the significance of the symbol in the eyes of the beholder. In James, there was no evidence to indicate what meaning the teacher's students ascribed to the armband he wore, although subsequent to the armband incident he stated that it was an expression of his religious aversion to war in any form and a sign of his regret over the loss of life in Vietnam. 461 F.2d at 568; see also id. at 569).

In any event, contrary to the position taken by the dissent, the protection which the Constitution affords to speech does not depend upon the precision of the message actually conveyed. If this were so, ballet and modern dance, for example, - the precise meaning of which is often unclear - would forfeit substantial constitutional protection. See Cohen v. California, 403 U.S. 15, 25 (1971)(First Amendment protection of linguistic expression not limited to "ideas capable of relatively precise . . . explication").

The dissent seeks to draw support from the decision of the Supreme Court in Cox v. Louisiana, 379 U.S. 536 (1965). Cox involved the physical patrolling of public streets which the state had an interest in regulating. The political assassination example cited in note 3 of the dissent's opinion is classically illustrative of this problem. In such circumstances, the law permits greater regulation of the "expressive" conduct than if pure speech were involved. But since, as the dissent points out, the Board's concern is that Brimley's not wearing a tie is an expressive act, this is a

case where the state seeks to regulate the communicative aspects of the symbolic activity. It is not a case, like Cox, in which the state's concern lies only with the non-communicative aspects of such activity.

Once it has been established that the right at stake is one protected by the First Amendment - be it the "symbolic expression just discussed or the academic freedom discussed by the majority - the dissent is wrong in stating that Kelley v. Johnson, supra, places the burden on plaintiff to demonstrate that the tie requirement which restricts that right "is so arbitrary that it serves no legitimate interest of the board." The Kelley Court made clear that it was holding the state to a less rigorous standard than would apply in a First Amendment case:

> "If such state regulations may survive challenges based on the explicit language of the First Amendment, there is surely even more room for restrictive regulations of state employees where the claim implicates only the more general contours of the substantive liberty interest protected by the Fourteenth Amendment."

425 U.S. at 245.

Kelley cited (and quoted from) Pickering v. Board of Education, 391 U.S. 563, 568 (1968), as setting the governing standard where a public employer seeks to restrict the First Amendment rights of its employees. In Pickering, the Court, as the panel majority did here, made careful inquiry as to the weight of each of the government's asserted concerns. See also, Hanneman v. Breier, 528 F.2d 750, 754 (7th Cir. 1976). The James Court, in applying the Pickering standard, stated the rule which governs here:

> "Any limitation on the exercise of [First Amendment] rights can be justified only by a conclusion, based upon reasonable

> inferences flowing from concrete facts and not abstractions, that the interests of discipline or sound education are materially and substantially jeopardized . . . ."
>
> * * * *
>
> "By requiring the Board of Education to justify its actions when there is a colorable claim of deprivation of first amendment rights, we establish a prophylactic procedure that automatically tempers abuse of properly vested discretion."

461 F.2d at 571, 575.

Even if it is assumed that Brimley's proposed activity would be "close to the 'conduct' end of the 'speech-conduct' continuum" (p. 1878), the plaintiffs have nonetheless, presented a "colorable claim" that Brimley's First Amendment rights were violated. Under the decision in James, this requires the Board "to justify its actions."

We perceive no basis for the suggestion in the dissent that a lesser showing is required where the activity is mostly conduct, but nevertheless involves speech as well. In such a case the standard should remain the same, even though it may well be easier for the state to show that it has a legitimate interest that is reasonably furthered by its policy. At some point, perhaps, the interest of the state may be so clear, and the policy so obviously related to that interest, that a court might conclude that it is unnecessary to put the state to its proof. If, for example, the Board adopted a policy forbidding a teacher to burn the American flag in the classroom, the obvious danger to the safety of the children might warrant a court in sustaining the policy against constitutional attack by a teacher who asserted that he wished to burn the flag as a form of symbolic speech. But that is hardly this case.

In conclusion, even assuming that the defendants will be able to establish at a trial that the challenged policy is reasonably related to a legitimate state interest in maintaining respect or discipline, this result is far from clear at this stage, as the majority opinion makes plain. Accordingly, it was inappropriate for the trial court to grant summary judgment. 1/

1/ It should be noted that the trial court granted "summary judgment" for the defendants although the defendants' motion was for judgment on the pleadings. Thus the record does not even contain an affidavit, much less testimony, stating what the Board's interests might be or how they are served by its policy.

II.

THE DISSENT WRONGLY CONCLUDES THAT THE BOARD'S INTEREST IN PROMOTING RESPECT FOR TRADITIONAL VALUES IS SUFFICIENT TO JUSTIFY INFRINGEMENT OF BRIMLEY'S FIRST AMENDMENT RIGHTS.

The dissent argues that Brimley's claim of free expression may be overcome by the "board's interest in promoting respect for . . . traditional values." "The inculcation of community values has been a goal of American public education since its very beginning." "I can see no reason to create a constitutional preference for the decision of an individual teacher in these matters over that of his employers."

It is true, as the majority concedes, and as the court wrote in James, that part of a school board's function is by nature the inculcation of "basic" community values. But the adjective "basic" is critical. As the court said in James, "a principle function of all elementary and secondary education is indoctrinative - whether it be to teach the ABC's or multiplication tables or to transmit the basic values of the community." Certainly it is true that whenever a school board decides on a particular curriculum, for example, it is by definition making a determination as to which basic values should be fostered through the education process. But it is a great leap from approving the inculcation of such basic values to the notion that it is properly the school board's function to indoctrinate students with a particular point of view as to matters currently in controversy in the community. A school board could not, consistent with the First Amendment, seek to inculcate students with a particular point of view as to, for example, the Viet Nam War, or the Equal Rights Amendment. To concede such a function as proper would be to "tolerate [actions] that cast a pall of orthodoxy over the classroom." Keyishian v. Board of Regents,

385 U.S. 589, 603 (1967).

Here, the value at issue is simply whether or not a tie should be worn. This value hardly seems of such a basic nature as to make it the proper object of school board indoctrination.

Indeed, the state interest which the dissent suggests is sufficient to overrule Brimley's First Amendment right is itself a constitutionally impermissible interest. The dissent states:

> "Against appellant's claim of free expression is the school board's interest in promoting respect for authority and traditional values, as well as discipline in the classroom, by requiring teachers to dress in a professional manner. The dress code here, while certainly not to everyone's taste, is a rational means of promoting these goals." (p. 1879).

As pointed out above, at least to the extent that the asserted interest is "promoting respect for . . . traditional values [here, the wearing of a tie]," the board's justification itself runs afoul of First Amendment values. The First Amendment does not tolerate the use of a school system to establish an orthodox view on a matter of social or political controversy. The dissent suggests that James sanctioned such indoctrination. The following excerpts from the James opinion show the contrary:

> "More than a decade of Supreme Court precedent leaves no doubt that we cannot countenance school authorities arbitrarily censoring a teacher's speech merely because they do not agree with the teacher's political philosophies or leanings. This is particularly so when that speech does not interfere in any way with the teacher's obligations to teach, is not coercive and does not arbitrarily inculcate doctrinaire views

in the minds of the students. Cf. Keyishian v. Board of Regents, supra."

461 F.2d at 573.

" * * * * Although sound discussions of ideas are the beams and buttresses of the first amendment, teachers cannot be allowed to patrol the precincts of radical thought with the unrelenting goal of indoctrination, a goal compatible with totalitarianism and not democracy. When a teacher is only content if he persuades his students that his values and only his values ought to be their values, then it is not unreasonable to expect the state to protect impressionable children from such dogmatism. But, just as clearly, those charged with overseeing the day-to-day interchange between teacher and student must exercise that degree of restraint necessary to protect first amendment rights."

461 F.2d at 573-574 (emphasis added).

* * * *

" * * * * Under the circumstances present here, there was a greater danger that the school, by power of example, would appear to the students to be sanctioning the very 'pall of orthodoxy,' condemned in Keyishian, which chokes freedom of dissent."

461 F.2d at 574 (footnote omitted).

"The dangers of unrestrained discretion are readily apparent. Under the guise of beneficent concern for the welfare of school children, school authorities, albeit unwittingly, might permit prejudices of the community to prevail. It is in such a situation that the will of the transient majority can prove devastating to freedom of expression."

461 F.2d at 575.

The reliance of the James court upon Keyishian is well-placed. There the Supreme Court made its classic statement in opposition to the use of schools as an indoctrination center for the values of a majority:

> "Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amenement, which does not tolerate laws that cast a pall of orthodoxy over the classroom. 'The vigilant protection of constitutional freedom is nowhere more vital than in the community of American schools.' Shelton v. Tucker, supra, at 487. The classroom is peculiarly the 'marketplace of ideas.' The Nation's future depends upon leaders trained through the wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, [rather] than through any kind of authoritative selection.' United States v. Associated Press, 52 F. Supp. 362, 372."

385 U.S. at 603.

To the same effect is the following statement from Tinker v. DesMoines Independent Community School District, 393 U.S. 503, 511 (1969):

> "In our system, state-operated schools may not be enclaves of totalitarianism. School officials do not possess absolute authority over their students. Students in school as well as out of school are 'persons' under our Constitution. They are possessed of fundamental rights which the State must respect, just as they themselves must respect their obligations to the State. In our system, students

may not be regarded as closed-circuit recipients of only that which the State chooses to communicate. They may not be confined to the expression of those sentiments that are officially approved."

See also, Van Alstyne, "The Constitutional Rights of Teachers and Professors," 1970 Duke L.J. 841, 855-858 (1970).

The panel majority addressed this point with persuasive words in its footnote 8:

"There is one additional interest that, while not explicitly asserted, may underlie the extremely weak interests advanced by the school board here: an interest in standardization or uniformity. Such a state interest cannot be recognized in the courts. All may not be forced by a school board to share the beliefs of the majority, whether it be a theory of the world's creation, Epperson v. Arkansas, 393 U.S. 97 (1968), a belief in saluting the flag, West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943), or a belief that the German language is evil, Meyer v. Nebraska, 262 U.S. 390 (1923). See Project, Education and the Law: State Interests and Individual Rights, 74 Mich. L. Rev. 1373, 1457-59 (1976). This must be so 'if we are not to strangle the free mind at its source and tench youth to discount important principles of our government as mere platitudes.' West Virginia State Board of Education v. Barnette, supra, 319 U.S. at 637. The Bill of Rights forbids us to adopt the credo of the Good Citizens' League of Zenith 'that American Democracy . . . demand[ed] a wholesome sameness of thought, dress, painting, morals, and vocabulary.' S. Lewis, Babbitt 311 (Signet ed. 1961) (1st ed. 1922)."

It is curious that the dissent, having suggested that the Board had a proper interest in trying to inculcate students with its view on the issue of whether a tie should be worn, suggests that Brimley could have spoken out in class against that view.

> "At the outset, Mr. Brimley had other, more effective means of communicating his social views to his students. He could, for example, simply have told them his views on contemporary America; if he had done this in a temperate way, without interfering with his teaching duties, the school board would be without power to punish him." (p. 1878).

If such direct classroom speech would be "more effective" in communicating Brimley's views, it would also be more effective in undermining the Board's assumed interest in communicating its own views. The dissent's analysis of the Board's overriding interest does not permit a conclusion that the Board can bar speech which is less effective in undermining the Board's interest but must tolerate speech which is more effective. In any event, the symbolic expression used by Brimley was less intrusive upon school board interests, for it took up no classroom time and therefore did not detract in any manner from the teaching of the assigned subject matter.

Finally, if the Board cannot otherwise justify its restriction, it can draw no support from the possibility that Brimley could communicate his message more directly. Unless the Board can demonstrate that it has a reasonable basis for believing that symbolic expression - as distinguished from direct expression - threatens to impair its legitimate interests, it cannot restrict such expression, any more than it could permit verbal but ban written criticism by teachers of school authorities. See Cohen v. California, 403 U.S. 15, 24 (1971) (referring to the "usual

rule that governmental bodies may not prescribe the form . . . of individual expression"). Since symbolic speech can be a powerful form of expression, a rule permitting the State, absent a showing that its action is reasonable, to bar symbolic expression where it permits direct expression would sanction governmental proscription of the very forms of communication which may be most effective. Thus, had the school board required Charles James to remove his armband and instead convey his message to his students verbally, it is difficult to believe that this court would have upheld such action against constitutional attack.

CONCLUSION

The decision of the panel should be sustained by the court en banc for the reasons expounded in the majority opinion and for the further reason that, since the Board has thus far failed to carry its burden of justifying the restrictions which the Board's policy places on symbolic speech, the grant of summary judgment was improper.

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Appellants

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BOARD OF EDUCATION OF THE TOWN OF
EAST HARTFORD, ET AL

Appellees APRIL 18, 1977

PROOF OF SERVICE

This is to certify that I mailed the Brief For The Appellants by putting two copies of the same in properly addressed envelopes, postage prepaid, on the 18th day of April, 1977, to Brian Clemow, Esquire and Coleman H. Casey, Esquire, of Shipman & Goodwin, 799 Main Street, Hartford, CT 06103.

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